

THE RIGHT TO REFUSE TO SELL

*"It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern."*¹

"We have not yet reached the stage, where the selection of a trader's customers is made for him by the government." This is the cogent sentence which closes, and at the same time summarizes, the opinion of Judge Lacombe, speaking for the United States Circuit Court of Appeals, of the Second Circuit, in the recent decision in a case which has already become an epoch-making one in the law of trade relations in this country.² This decision, and the decision of the U. S. District Court, of which it is an affirmance, establish the right of a private trader to refuse to sell, as a constitutional property right which cannot be taken away by legislative interference, either state or national.

In that case, the defendant marketed under its own trade-marked name and brand its own peculiar selection of a well-known commodity which is constantly produced in the manufacture of flour and in such quantities that the particular selection in question consumed only an insignificant portion of the available supply. By maintaining the dependability of its selection, as to quality, and by establishing its reputation with the ultimate consumer, it had made its brand of great celebrity and, therefore, of great value. It delivered its goods to its customers at a uniform price throughout the country, absorbing freight charges and diminished profits due to variations in the market price of the commodity from which its selection was taken. It sold directly to jobbers and the latter sold to retailers from whom the consumer purchased, and the prices to its direct vendees, and from the latter to their vendees, were scheduled so as to allow a fair profit to the retailer in his dealings with the ultimate consumer. It did not attempt to control the resale price by any contract or condition subsequent, applicable to any goods after they had

¹ Cooley on Torts, p. 278.

² *The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, decision by the U. S. C. C. of A., Second Circuit, filed Nov. 10, 1915, 227 Fed. Rep. 46; affirming the decision in same case of U. S. Dist. Ct., Southern Dist. of N. Y. (by Judge Hough), filed July 20, 1915, 224 Fed. Rep. 566.

passed out of its hands; but, by its system of distribution and sale, expressly reserved the right to refuse to sell to any customer who did not comply with its reasonable requests. In other words, it impliedly announced its intention of refusing to sell, so far only as further sales were concerned, to any customer who, as to goods already sold, engaged in cut-price practices, to the injury of its reputation and that of its brand, or to the injury of those who were directly or indirectly its customers.

The plaintiff was a chain-store retailer whose business was so large that defendant allowed it to buy in carload quantities and at the carload price, and therefore it could, with a profit, sell at a lower price than could the regular retailer who bought only in smaller quantities and, therefore, at a higher cost. After a time, the plaintiff began to use this advantage, not for its own profit, but to establish a cut-price competition, to the injury of the defendant's business and of that of the regular retailers upon whose success depended that of defendant. Whereupon the defendant refused to sell to plaintiff at any price; and the latter brought suit for an injunction to compel defendant to sell plaintiff, and at the prices formerly maintained between the two. The application was based upon the claim that the Anti-trust Acts, and particularly the Sherman Act and the Clayton Act, made the refusal of defendant to sell plaintiff an attempt to restrain competition by means of an indirect maintenance of prices and in promotion of a monopoly in the branded goods in question.

The denial of the application for injunction by the District Court and its affirmance by the Appellate Court were based on the contention of the defendant, upon which it rested its defence, that it was only exercising its constitutional right to refuse to sell, and that under all the circumstances, and particularly in view of the fact that its only monopoly was of its brand and not of its merchandise, it could not be deprived of that right, even though the Congress should attempt to do so.

A FUNDAMENTAL RIGHT

Much misapprehension has been current as to the force and effect of this decision, as well as to its consistency with other federal decisions involving questions of price-maintenance. This decision was the first under the so-called "Clayton Act," whereby the provisions of the former Anti-trust Acts were amended and extended. The tendency toward governmental interference in matters of private contract and of interstate trade relations had

been extending until the theory of federal legislation had emerged, that, under the guise of regulating commerce between the states, the Congress could lay its hand upon every private transaction between individuals of different states. Just how far it was intended to extend this theory by the Clayton Act, it is difficult to determine from the confusion and manifest conflict of many of its terms, and particularly those of Section 2 in which discrimination as to prices and as to the selection of customers is treated.³ So far, however, as concerns the right of a private trader to refuse to sell, the rule is established by this case that, if Doe refuses to bargain with Roe "for any reason or no reason," such conduct does not give Roe a cause of action; and that "if the Congress has sought to give one, the gift is invalid, because the statute takes from one person for the private use of another the first person's private property."⁴ Or, as stated by Judge Lacombe in that part of his decision which precedes the part first above quoted:

"We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased and that his selection of seller and buyer was wholly his own concern. * * * Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him;—it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act has changed the law in this particular."⁵

The "elementary law" referred to by Judge Lacombe is clearly established by the decisions wherein has been involved the question of the right of a private trader to accept or to refuse a customer. The U. S. Circuit Court of Appeals, Second Circuit, had held that, whatever might be the rights of a complainant to an injunction against those conspiring to injure its business, an injunction would not lie to compel a defendant against its will

³ Clayton Act of October 15, 1914.

⁴ *The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. Rep. 566.

⁵ *The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, opinions by Judge Lacombe of U. S. C. C. of A., Second Circuit, filed Nov. 10, 1915, 227 Fed. Rep. 46.

to sell goods to the complainant.⁶ The U. S. Supreme Court had held that "freedom to contract and abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law."⁷ The federal court had also said:

"All of the rights of contract which are necessary for the carrying on of ordinary business affairs are protected by the constitution, and are not capable of being restrained by legislative action. Among these rights is that of forming business relations between man and man. A man may form business relations with whom he pleases, and in the conduct of such business they may fix and limit the character and amount of their business, the price they will charge for the produce which they offer to the public, or about which they contract. * * * A man has a constitutional right to buy anything * * * or to refuse to sell it at all."⁸

The U. S. Circuit Court of Appeals, Second Circuit, decision by Judge Lacombe, had also held:

"An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or sell to anyone with whom he thinks it will promote his business interests to refuse to trade. That is entirely a matter of his private concern, with which governmental paternalism has not as yet sought to interfere."⁹

The same court, Eighth Circuit, decision by Judge Sanborn, where a refusal to sell was complained of, held:

"There was no law which required the coal company to sell its coal to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms, and to sell to others at another price and on a different set of terms. There is nothing in the act of July 2, 1890, which deprived the coal company of any

⁶ *Greater New York Film Rental Co. v. Biograph Co.*, 203 Fed. Rep. 39.

⁷ *Standard Oil Co. v. U. S.*, 221 U. S. 1, 56; and *Adair v. U. S.*, 208 U. S. 161, 172.

⁸ *In re Grice*, 79 Fed. 627.

⁹ *Dueber Watch Case Co. v. Howard Watch Co.*, 66 Fed. 637, 645.

of these common rights of owners and vendors of merchandise, and, if it did not combine with some other person or persons so to do, its refusal to sell its coal to Sharp unless he would withdraw his advertisement of a reduction in his retail price of it, was not the violation of the Sherman Anti-Trust Act charged in the indictment."¹⁰

PRICE-MAINTENANCE NOT UNLAWFUL PER SE

The fallacy of those who deny the right to refuse to sell, or who confine the exercise of such right within limits which do not involve either a direct or indirect maintenance of resale prices, arises from a misapprehension of the established fundamental rule that a private person must be protected in his right to alienate his private property. It is said that the property in a thing having once passed from A to B, then B's right of alienation should remain unrestricted, and that any attempt, by conditions subsequent, either as to prices or otherwise, to restrain or restrict such right of alienation, or in any wise to retain control of the vendor of the thing sold, is a restraint of trade repugnant to the common law as well as to statutory law.

It is further claimed that an attitude of mind on the part of the vendor which is marked by his determination not to make further sales, in case goods already sold are not handled by the vendee according to request, constitute such unlawful restriction upon alienation. But such reasoning fails to recognize the very right of alienation against which it is sought to avoid restriction. The right to alienate cannot exist except that there goes with it at the same time the right to refuse to alienate. Freedom of alienation, which is the fundamental right, includes the right of refusal to alienate just as much as it does the right to alienate. Moreover, neither of these rights is dependent upon the motive or the reasons which move the trader in his action with respect to them. A private trader may sell to one man because he is red headed, and may refuse to sell another man because he is not red headed. The point is, that the reasons are immaterial. Consequently, the right to refuse to alienate is not diminished by the fact that it happens in any particular case that the real reason for the refusal is the conduct of the proposed vendee with respect to past transactions; and this is just as true whether the conduct complained of is a failure to maintain resale prices as any other action or failure of action.

¹⁰ *Union Pacific Coal Co. v. U. S.*, 173 Fed. Rep. 737.

There is a distinction between the legal exercise of the right of price-maintenance and the unlawful exercise of such right. There is a vast difference, both in reason and in law, between an attitude of mind on the part of the trader toward his customers in respect of potential sales, and an attempt on the part of the same trader to control by contract the resale prices of goods already sold and to enforce such resale contracts by suits for injunction or for damages. The fact is too much overlooked, that the cases, in which resale prices have been attempted to be maintained by a vendor and in which such attempts have been held illegal and unenforceable, have been cases where the vendor has attempted to enforce contracts, express or implied, between himself and his vendee for the maintenance of such resale price. Moreover, in such cases the particular merchandise in question was of the kind which was not only susceptible of monopoly, but was of a kind in which the vendor had an exclusive monopoly. Such, for instance, was the so-called "Peruna" case;¹¹ the patent medicine case;¹² the copyrighted book cases;¹³ and the so-called "Sanatogen" case.¹⁴

All these cases involved a monopolized kind of merchandise and the attempt on the part of the vendor to enforce a contract as to resale prices. In none of them is involved the question of the right to refuse to sell. Neither is the so-called "Toasted Corn Flakes" case an authority for the restriction of the right to refuse to sell, for that case involved a merchandise which was confessedly prepared and cooked by a secret process and thereby became a separate commodity actually monopolized by the vendor; and by the decision in that case, the general right to refuse to sell, applicable to unmonopolized articles, was expressly recognized, for the court said:

"Nor do the facts present a case for the application of the rule, that defendants are not required to sell anyone they do not wish."¹⁵

It is also a mistake to view the consent decree entered in the Kellogg case as an adjudication against the right to refuse to

¹¹ *Park & Sons v. Hartman*, 153 Fed. 24.

¹² *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373.

¹³ *Bobbs-Merrill v. Strauss*, 210 U. S. 339; *Strauss v. American Publishers Assn.*, 231 U. S. 222, 236.

¹⁴ *Bauer v. O'Donnell*, 229 U. S. 1.

¹⁵ *U. S. v. Kellogg Toasted Corn Flakes Co.*, 222 Fed. 725-729.

sell even as to the kind of merchandise there involved; for, by the terms of the consent upon which such final decree was entered, the right to refuse to sell was expressly reserved.

The statement, therefore, by Judge Lacombe, that, as applied to branded goods as to which the monopoly consisted of the control of the brand rather than of the goods themselves, it was "elementary law that a trader could sell to whom he pleased and that his selection of seller and buyer was wholly his own concern," is fully supported by all the precedents.

Indeed, further support of the right to refuse to sell in such cases is shown by certain state decisions which, with their reasoning, are approved and followed by the federal courts in the decisions of Judges Hough and Lacombe, here discussed. In California, a marketer of a branded selection of olive oil was held to have the right to make enforceable contracts for resale prices,¹⁶ as was also the marketer of a selection of chocolate which he sold under his special brand and name.¹⁷ In both those cases the right was sustained, even as to the making of contracts for resale prices, because the contract did not involve the whole of any commodity, but only a selection therefrom, and because the monopoly in question was only in the brand and name and not in the commodity. The federal cases decided under the Anti-trust Acts, already referred to, were clearly distinguished by the California court. These cases and the decisions therein made were afterwards followed by the Washington court in a case where a manufacturer of a particular brand of flour was held to have a monopoly, not of flour, but of his brand, and, there being no monopoly of the commodity itself, therefore a contract for a resale price was not unenforceable as being repugnant to the prohibitions against restraint of trade, either under the common law or under the statutes of the state or of the nation.¹⁸

PRICE-MAINTENANCE FOR BRANDED UNMONOPOLIZED GOODS

From the foregoing it is manifest that it has been too much assumed by the proposers of certain federal legislation in amendment of the present Anti-trust Acts, that the federal decisions against price-maintenance prevent the marketer of a branded selection out of an unmonopolized commodity, whose monopoly

¹⁶ *Grogan v. Chaffee*, 156 Cal. 611.

¹⁷ *Ghirardelli v. Hunsicker*, 164 Cal. 355.

¹⁸ *Fisher Flour Mills Co. v. Swanson*, 76 Wash. 649.

consists alone of his trade-marked brand and name, from making enforceable contracts as to resale prices which are reasonably necessary to protect him in the business and good will built up upon the strength of his own brand and name. It is now clearly decided that, with respect to such selections of merchandise, there is nothing in existing laws which prevents the trader from refusing to sell; and, further, that any attempt to restrict such right of refusal to sell, especially as applied to such merchandise, would be invalid.

These decisions should be an authority and recommendation to the Congress to pass the so-called "Stevens Bill," expressly authorizing the maintenance by contract of resale prices, of goods sold under trade-mark or special brand, provided the contracting vendor has not a monopoly in the general class of merchandise to which such goods belong and is not a party to a combination with competitors to maintain such prices.

Whether the right of such price-maintenance shall depend upon elementary principles of law, as held in these recent decisions, or shall depend upon legislation, so far as such legislation shall be necessary, the establishment of such right is absolutely essential to the proper protection of the brand and name belonging to any trader under the trade-mark laws. The establishment of the right to refuse to sell, now clearly adjudicated to be beyond the power of legislative interference, is a long step toward the necessary protection of the owner of a trade-marked brand. Without further legislation, such as is proposed by the Stevens bill, the indulgence in unfair methods of competition through price-cutting will result in the destruction of the good will and business of the owners of brands and will injure public interests by the stifling of competition.

THE STRANGLING OF COMPETITORS BY PRICE-CUTTING IS NOT
"COMPETITION"

A price cutter is usually a financially strong trader, who makes up his losses of profits on cut-price goods either by the number of his sales or by extra profits on other articles sold to the consumer under the decoy of the cut-price upon one or a few articles. The regular retailer cannot meet such competition and is driven out of business. That which is, properly speaking, "competition" in trade, is thereby strangled and the only competition which is promoted is that of the particular branded article

against itself. As stated by Judge Hough in the decision above cited:

"the only trade restrained" [by price-maintenance of branded selections of unmonopolized goods] "is the commercial warfare of a large buyer against small ones, or that of a merchant who for advertising purposes may sell an article at a loss, in order to get customers at his shop; and then persuade them to buy other things at a compensating profit * * * Competition, as encouraged by statutes and decisions, does not include such practices."

Indeed, as stated by Judge Hough, it is precisely such cut-price methods of competition "whose hardships and injustice have often been judicially commented upon."¹⁹ The Federal Supreme Court, referring to such practices, has stated:

"In business or trade combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly or unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings."²⁰

So, the New York Court of Appeals:

"An active competition and rivalry in business is, undoubtedly, conducive to the public welfare, but we must not shut our eyes to the fact that competition may be carried to such an extent as to accomplish the financial ruin of those engaged therein and thus result in a derangement of the business, an inconvenience to the consumers, and in public harm."²¹

In its most recent decision under the Anti-trust Acts the Federal Supreme Court said:

"It is a mere truism to say that the fixing and maintaining by a manufacturer of a fair price above cost is not only a right but a commercial necessity; and any

¹⁹ *The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. Rep. 566.

²⁰ *U. S. v. Freight Assn.*, 166 U. S. 321, 322-324.

²¹ *Park v. Nat'l Wholesale Druggists Assn.*, 175 N. Y. 1.

other course must end in his bankruptcy. When such fair prices are departed from, and they are unreasonably raised and exacted from the purchasing public, the public is prejudiced thereby. On the other hand, when that price is so unreasonably lowered as to drive others out of the business, with a view of stifling competition, not only is that wronged competitor individually injured, but the public is prejudiced by the stifling of competition."²²

THE DENIAL OF THE RIGHT TO REFUSE TO SELL MEANS GOVERNMENTAL PRICE FIXING

The denial of the right of a trader to refuse to sell, and that independently of the reasons for his refusal, would mean a return to the obsolete and the unworkable system of governmental price fixing. To enjoin a trader from refusing to sell,—that is, to impose by statute or by injunction a compulsion to sell,—necessarily involves the fixing of the price at which he shall sell. In the case before Judge Hough it was argued that, because defendant could not enforce a price-fixing agreement, it could not accomplish by any method, even indirectly or partially, any fixing of prices. But this argument is answered by Judge Hough by his statement that: "It is an amusing commentary on this doctrine that the main object of this suit is to have this Court *compel* delivery at \$3.95 per case,—which is *pro tanto* price fixing."²³

A doctrine which viewed mere abstention from dealing as *per se* price-fixing, and, therefore, as an abstention which gives the right of injunction, would lead to a return to the meddling paternalism of those ancient statutes which utterly disregarded the fundamental right of liberty of contract and of property,—statutes which were repugnant to the elementary private right of alienation. Until comparatively recent times there have remained upon the statute books of England certain ancient statutes which have become obsolete, but which are the remnants of the once interfering hand of the legislature in respect of private contracts of sale. One of these is the statute fixing the maximum price of labor and imposing upon all the legal obligation to work for anyone who demanded service.²⁴ An English

²² *U. S. v. U. S. Steel Corporation*, decided June 3rd, 1915, U. S. District Court of New Jersey, opinion by Buffington, Judge, page 33.

²³ *The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. Rep. 566.

²⁴ The English Statute of Labours, of 1349.

act of 1350 compelled laborers to stand for hire in open market and to serve at not less than maximum prices, and also prohibited departure from the country. In 1562 another statute required all able-bodied persons between certain ages to work for anyone demanding their services, and empowered justices-of-the-peace and sheriffs in each county to fix and limit the wages to be paid; and the same statute also fixed the minimum hours for labor.

In America the Continental Congress, on November 22, 1777, in order to remedy the disadvantages of the depreciated currency, passed a resolution providing for the appointment of commissioners from the different states to regulate the price of labor, manufactures and produce; and in 1778, the New York legislature passed an act fixing the wages of labor and the prices of many articles of merchandise and even the profits of traders and vendors. In 1776-7, on the recommendation of a committee representing the New England states, many of those states adopted statutes fixing the maximum prices of labor and of wheat, salt, sugar, molasses, shoes and of many other articles of merchandise. All such statutes were found unenforcible as a practical matter, although constitutional protection of the liberty of contract and of the right of alienation of private property was not then alone sufficiently preventive of the enforcement of such legislation.

The assertion today of the right of governmental prohibition, whether through the courts or through the legislature, of the right of a private trader to refuse to sell his private property, would be a return to the obsolete doctrines of those ancient statutes; which are so contrary to the theory of our present constitutional government, that they are now cited only as impossible absurdities. They constitute instances, in the words of Judge Lacombe, "where the selection of a trader's customers is made for him by the government." They denote a policy of governmental meddling with private business transactions which has been altogether too closely approached, but as yet not reached, in modern American jurisprudence.

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